IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.274 OF 1996

Shri Tukaram Kushaba Gujar, .. Petitioner

Vs

1. Shri Dagadu K Masurkar,
since deceased, through his legal
heirs:
1-A Smt Dagadabai Dagadu Masurkar
and ors. .. Respondents.

Ms P.N.Diwan h/f Mr Balkrishna D Joshi, for the petitioner.
Ms A.N.Helekar, for respondent no.1(c) and 2.

CORAM : D.B.BHOSALE,J.
DATE : 31.08.2006

ORAL JUDGMENT :

1. Heard the learned counsel for the parties.

2. This petition is directed against the order dated 4.8.1995 passed by the trial Court on the application filed by the petitioner-plaintiff under Order 6 rule 17. By that order, the application seeking amendment of the pleadings has been rejected mainly on the ground of delay and holding that it changes the suit property. Ms.Diwan, learned counsel for the petitioner, submitted that by the proposed amendment the petitioner-plaintiff sought the correction of the description of the suit property in the plaint and it does not change the suit property as held by the trial court. She further submitted that the trial Court ought to have allowed the

amendment application with liberty to the respondents-defendants to file an additional written statement. She placed reliance upon the judgment of the Apex Court in Sajjan Kumar Vs Ram Kishan, (2005) 13 Supreme Court Cases 89, to contend that the facts of the present case and the case before the Supreme Court are identical. Ms.Helekar, learned counsel for the respondents, on the other hand, submitted that the subject matter of the suit cannot be allowed to be changed by way of amendment. She further submitted that this is a suit of 1976 and the application for amendment was filed in 1995 and, therefore, the trial Court was right in rejecting his application on the ground of delay.

3. I perused the order, the application seeking amendment and the copy of the plaint. It is true that to some extent, the plaintiff by way of amendment has changed the description of the eastern boundary of the suit property. The suit is filed for removal of encroachment. Keeping that in view and considering the settled position in law that all amendments of the pleadings should be allowed which are necessary for determination of the real controversy between the parties, I am inclined to allow the writ petition. The real controversy test is the basic or cardinal test and

it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. The Court is not expected to go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the trial Court in the instant case. The trial Court, without deciding whether the amendment in question was necessary has expressed his opinion that the proposed amendment changes the description of the property in the plaint. The Apex Court in Sajjan Kumar’s case (supra), while dealing with similar situation in paragrpah 5, held thus:

> "Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial Court, while rejecting the prayer for amendment, has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial Court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written

> statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff-appellant succeeding in the suit."

It is true, as contended by Ms Helekar, learned counsel for the respondent, that the petitioner-plaintiff ought to have sought such amendment of the pleadings promptly at an early stage of the suit. However, that by itself would not precluded him from seeking amendment if it was necessary for the purpose of bringing to the fore the real question in controversy between the parties. That has not been done by the trial Court while rejecting his application. In my opinion, no prejudice whatsoever would be caused to the respondent-defendant if the plaintiff is allowed to carry out the amendment. Keeping that in view and considering the overall facts and circumstances of the case, this petition is allowed. Rule is made absolute.

. The petitioner is directed to carry out the amendment within four weeks from the date of receipt of this order. The respondents-defendants shall have a liberty to file additional written statement, if they so desire, within four weeks therefrom. The trial Court shall decide the suit as expedtiously as possible and preferably within a period of one year from today.

(D.B.BHOSALE,J.)